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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT JAY MAXWELL,

Defendant and Appellant.

D054785

(Super. Ct. No. SCS191128)

APPEAL from a judgment of the Superior Court of San Diego County, Esteban Hernandez, Judge. Affirmed.

This is an appeal after a remand for resentencing was ordered following the first appeal. On January 29, 2005, Robert Jay Maxwell, together with several other people, committed various crimes during a home invasion robbery at the residence of Ryan Guerrero in Coronado, California. As a result, Maxwell proceeded to trial with codefendants Thomas T. Zingsheim and Michael J. Murphy after codefendants Tuesday Ditmars and Evan Baltsas pled guilty to various crimes stemming out of the Coronado

incident and another residential burglary. As pertinent here, the jury found Maxwell guilty of first degree robbery (Pen. Code,<sup>1</sup> §§ 211, 212.5, subd. (a); count 1); two counts of assault with a semiautomatic firearm (§ 245, subd. (b); counts 2 & 3); residential burglary (§§ 459, 460; count 4); false imprisonment by violence or menace (§§ 236, 237, subd. (a); count 5); grand theft of personal property (§ 487, subd. (a); count 6); intimidating a witness by malicious use of force or violence (§ 136.1, subd. (c)(1); count 7); and tampering with the electric alarm system and four telephone and cable television lines (§ 591; counts 8-12).

The jury further found true allegations that Maxwell had personally used a firearm in the commission of counts 1 through 6 (§ 12022.5, subd. (a)); that he also had personally used a firearm within the meaning of section 12022.53, subdivision (b) in the commission of the count 1 robbery; that he was vicariously armed with a firearm for count 7 (§ 12022, subd. (a)(1)); and that he committed the burglary while another person other than an accomplice was present in the residence.

After Maxwell then admitted he had previously suffered a serious felony conviction, which qualified as a strike under the Three Strikes law, the court found true allegations under section 667, subdivision (a)(1) and the three strikes law. (§§ 667, subds. (b)-(i); 1170.12.) The court subsequently granted Maxwell's motion to dismiss his strike and sentenced him to a total prison term of 21 years.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise specified.

On appeal, this court affirmed Maxwell's convictions, struck the finding and term for his prior serious felony conviction, reversed a restitution order regarding Guerrero, and remanded the case to the trial court for resentencing based on error in imposing the upper term on the count 1 residential robbery.

On February 25, 2009, after considering our earlier unpublished opinion in *People v. Zingsheim* (July 10, 2008, D049189) (*Zingsheim*), the probation reports and sentencing memoranda, and hearing arguments from counsel, the trial court resentenced Maxwell to a total prison term of 19 years, four months, and continued the matter of restitution to Guerrero. In doing so, the court exercised its discretion to again strike Maxwell's strike prior and again imposed an upper term of six years for the count 1 residential robbery and added a 10-year term for the firearm use enhancement (§ 12022.53, subd. (b)). In addition, it imposed a consecutive term of three years, four months on the count 2 assault with a semiautomatic firearm and its attached enhancement (one-third the midterm of six years or two years, plus one year, four months, which is one-third the midterm of four years) and imposed concurrent terms, which it then stayed under section 654, for the remaining counts.

Maxwell appeals seeking a second resentencing on grounds the trial court violated section 654 when it failed to stay the sentence for the count 2 assault with a semiautomatic firearm and its attendant firearm use enhancement instead of imposing a consecutive term for that count. We affirm.

## DISCUSSION<sup>2</sup>

On appeal, Maxwell raises only one sentencing issue as to whether section 654 precludes the consecutive sentence imposed during the resentencing on count 2.<sup>3</sup> He specifically argues that the facts do not support the trial court's finding at the second sentencing that counts 1 and 2 had separate intents and objectives, but rather show only "one agreement to rob and 'rough up' Guerrero by the participants ([himself], Murphy, Zingsheim and Ditmars) before entering Guerrero's home." He further argues that case law "disallows punishment for an assault that is part of the same overall intent supporting the robbery." We conclude the trial court properly imposed a consecutive term for count 2.

In general, section 654<sup>4</sup> prohibits multiple punishment for an indivisible course of conduct even though it violates more than one statute. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) Whether a course of conduct is indivisible depends on the intent and objective of the actor. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19; see also *People v.*

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<sup>2</sup> The facts regarding Maxwell's offenses are well known to the parties and fully set forth in our unpublished opinion in *Zingsheim, supra*, D049189, and will not be repeated here. We have granted Maxwell's unopposed request to take judicial notice of the record in that earlier appeal.

<sup>3</sup> Although Maxwell did not object below, it is settled law that a claim based on a violation of section 654 may be addressed on its merits even though the issue was not raised below. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.)

<sup>4</sup> Section 654 provides in pertinent part: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

*Latimer* (1993) 5 Cal.4th 1203.) "If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*People v. Perez* (1979) 23 Cal.3d 545, 551.) Even though our Supreme Court has in the past criticized this test, it has more recently reaffirmed it as the established law of this state. (*People v. Britt* (2004) 32 Cal.4th 944, 952.) In so doing, the court noted "that cases have sometimes found separate objectives when the objectives were either (1) consecutive even if similar or (2) different even if simultaneous. In those cases, multiple punishment was permitted. [Citation.]" (*Ibid.*) In other words, "if the defendant harbored 'multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]" [Citations.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143 (*Jones*).)

The issue of whether section 654 precludes punishment in any case "is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]" (*Jones, supra*, 103 Cal.App.4th at p. 1143.)

Here, in addressing its decision to impose a consecutive term on count 2, the trial court stated, "[w]ith regards to any [section] 654 issue that may be -- believed to exist,

the Court finds that there is no [section] 654 issue. The robbery on Count 1 and the assault with a deadly weapon in Count 2 had separate intents and separate objectives, so the Court finds that as a finding of fact." The court's finding of fact that there were separate intents and objectives is supported by the trial evidence.

Although in his defense at trial, Maxwell denied he had a weapon at Guerrero's, denied he had talked with Ditmars about stealing property or about kicking Guerrero's ass, and denied he had made any agreement with the others to rob Guerrero with weapons, claiming only that he had gone to Guerrero's with Ditmars so she could get back her property after he had raped her, the prosecution evidence clearly showed he and the others went to Guerrero's house to both punish Guerrero for the alleged sexual assault on Ditmars and to steal his property.

In Ditmars' testimony, as well as in her statements made in pretrial interviews with the police, which were entered into evidence, she related that after arriving "at Maxwell's, whom she remembered had previously fought with Guerrero and might come to her rescue," she told him she had been raped by Guerrero and "was 'going back and rolling on' [him]." She also talked about how others, including herself, talked in Maxwell's presence about stealing items from Guerrero and how Maxwell "talked about going to 'kick his ass.' " In Guerrero's testimony, he described the fight with Maxwell and Murphy who both had guns when they arrived at his home with Ditmars. In response to Guerrero's inquiry as to why they were beating him, they explained they were doing so to teach him a lesson for "doing more with a girl than she wants to do" and that he "just

shouldn't do that to a female." Afterward, they took him downstairs where they joined Ditmars and Zingsheim in robbing him.

From the above evidence, the court could have reasonably found two separate intents were simultaneously held by Maxwell which were independent of and not merely incidental to each other " 'even though the violations . . . were parts of an otherwise indivisible course of conduct. [Citation.]' [Citations.]" (*Jones, supra*, 103 Cal.App.4th at p. 1143.)

Contrary to Maxwell's arguments on appeal, the fact that the intents may have arisen in a single conspiracy or agreement does not preclude multiple punishment when the evidence plainly shows, as here, multiple intents. Maxwell was not charged with or punished for a conspiracy to commit the crimes for which he was actually charged and convicted. Thus, to the extent he relies on conspiracy cases, which usually focus on whether the substantive offenses are the same as the offenses underlying the conspiracy and hold that "a defendant may not be sentenced 'for conspiracy to commit several crimes and for each of those crimes where the conspiracy had no objective apart from those crimes' " (*People v. Ramirez* (1987) 189 Cal.App.3d 603, 615), his reliance is misplaced.

Further, Maxwell's reliance on numerous cases holding that double punishment is prohibited when an assault is the means by which a robbery is committed is also unfounded. Not only do those cases not prohibit multiple punishment when the assault and robbery arise from separate intents and objectives (see *People v. Coleman* (1989) 48 Cal.3d 112, 162), as already noted, the evidence at trial in this case readily established

that Maxwell acted with both the intent to punish Guerrero for the alleged rape and the separate intent to steal Guerrero's property.

In sum, substantial evidence supports the trial court's express finding of fact that the crimes in counts 1 and 2 arose from separate intents and objectives. Consequently, the court properly imposed a consecutive term for count 2.

#### DISPOSITION

The judgment is affirmed.

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HUFFMAN, Acting P. J.

WE CONCUR:

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HALLER, J.

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McINTYRE, J.